

1 ORDER

2 The Department of Ecology Order No. DE 84-300 is vacated and the
3 matter is remanded for factual determinations and further
4 considerations consistent with these findings and conclusions.

5 DATED this 19th day of December, 1984.

6 POLLUTION CONTROL HEARINGS BOARD

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9 GAYLE ROTHROCK, Chairman

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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 84-171 & -181
CONCURRING OPINION

1 and the public interest. For that reason, the subject order is set
2 aside and the matter remanded to the Department for further data
3 collection, including current and historic pond level measurements on
4 each owner's pond boundaries.

5 VII

6 The landowners must accept a factually-supported and negotiated
7 level for the pond and then share in the payment for pond level
8 restoration. This agreed-upon level may require artificial devices to
9 maintain that level and resolve the conflict amongst the owners.
10 Here, it is not a useful function of this Board to make these
11 technical determinations and recommendations in the first instance;
12 such is the responsibility of the Department, with the full
13 cooperation of the owners. DOE and the owners can, after considering
14 the matter further, reach a satisfactory solution to this problem.

15 VIII

16 Any Finding of Fact which should be deemed a Conclusion of Law is
17 hereby adopted as such.

18 From these Conclusions the Board enters this
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26 FINAL FINDINGS OF FACT,
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1 reduction of the substantially natural condition during this season
2 (fall) of the year.

3 IV

4 Whether DOE has the authority to issue an order to enforce RCW
5 90.54, instead of limiting itself to rulemaking, (as it pertains to
6 ponds) is more difficult to answer. There is authority in a prior
7 PCHB case cited by DOE (Smith v. DOE & Lucas, PCHB No. 81-34) applying
8 to stream care under RCW 90.54. That also logically applies to
9 ponds. Regulatory orders apply to any chapter or statute the director
10 of the department is charged with administering and to all natural
11 water bodies cited in those statutes. While it cannot be shown that
12 appellants intend to wholly drain the pond, and it has not been shown
13 OBA should be solely responsible for illegal stream outlet clearance
14 on its land, it cannot be claimed that the department has no right to
15 issue regulatory orders under the Water Resources Act of 1971. The
16 only claim which can be supported is that inadequate numbers of
17 parties were held responsible for resolution of the pond maintenance
18 problem.

19 V

20 DOE is empowered to issue such an order but it must issue with
21 assurances that it is predicated upon good data which can be relied
22 upon by all parties responsible for a solution. The one steel post
23 measure on the Racine property is inadequate data.

24 It is in the interests of the state and owners of the pond to
25 arrive at a level of the lake that benefits their individual interests

26 FINAL FINDINGS OF FACT,
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1 some persons were attempting to reduce the size of the pond, that
2 appellants should be responsible, and that some persons were going to
3 attempt to further drain the pond. Hence the order was issued.

4 A regulatory order is not the usual method of enforcing chapter
5 90.54. The Department acknowledges that this is the first time an
6 order has been issued to enforce this RCW chapter, as it relates to
7 ponds. The Board examines this authority, then, very carefully.

8 XII

9 Any Conclusion of Law which should be deemed a Finding of Fact is
10 hereby adopted as such.

11 From these Findings the Board comes to these

12 CONCLUSIONS OF LAW

13 I

14 The Board has jurisdiction over these persons and these matters.
15 RCW 43.21B.

16 II

17 The subject body of water is a pond within the meaning of RCW
18 90.54.020(3)(a).

19 III

20 The lake has varied 15' to 20' horizontally over the years. The
21 testimony is conflicting on the historic size of the lake. It is
22 ascertainable that the post-blast 1984 level of the pond is lower than
23 it has been in recent years. Water marks on stumps attest to that, as
24 does the overly-elevated duck blind. The preponderance of the
25 evidence indicates that the present level represents a modest

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1 1971 (RCW 90.54) as it pertains to ponds; and finally, (4) if it does,
2 did DOE follow the correct procedure in issuing the order?

3 X

4 Appellants each testified that it is not their intent to drain the
5 pond. They assert their only desire is to control the water level so
6 that it does not flood their property. The state asserts ponds must
7 be retained substantially in their natural condition and wetland areas
8 should be protected. RCW 90.58.020(3)(a) states

9 (3) The quality of the natural environment shall be
10 protected and, where possible, enhanced as follows:

11 (a) Perennial rivers and streams of the state
12 shall be retained with base flows necessary to
13 provide for preservation of wildlife, fish,
14 scenic, aesthetic and other environmental
15 values, and navigational values. Lakes and
16 ponds shall be retained substantially in their
natural condition. Withdrawals of water which
would conflict therewith shall be authorized
only in those situations where it is clear that
overriding considerations of the public interest
will be served.

17 Further, the state acted by issuing a regulatory order under statutory
18 authority they deemed to be correct.

19 RCW 43.21A.190 states:

20 A regulatory order may be issued to a person
21 violating or about to violate, the following chapters
22 . . .

23 (6) Any other chapter or statute the Director of the
24 Department of (Ecology) is charged with
25 administering. . .

26 XI

27 DOE argues that these above-cited provisions of the law enable the
Department to issue a regulatory order. The Department believes that

1 3. The crest of the weir shall be at the same
2 elevation as the top of the steel post located
3 approximately 750 feet west and 870 feet north
4 from the southeast corner of Section 26, T. 19
5 N., R. 3 W.W.M. Said steel post being located
 on the Alfred G. Racine property and identified
 by florescent color and marked by florescent
 flagging.

6 and further required that there be no ditching of or modification to
7 the outlet stream on Lot 4 of the proposed OBA large lot subdivision.

8 VII

9 Feeling aggrieved by this order of DOE, appellants appealed to
10 this Board on June 27, 1984.

11 VIII

12 Mr. Edgington testified that in the more distant past, the lake
13 had been approximately three quarters of its present size. He
14 indicated that it has always fluctuated with the seasons of the year.
15 There is a system of drain tiles beneath his fields in this area which
16 were installed prior to the time the parties in the case acquired
17 their properties. These drain tiles allow and direct flow into the
18 pond. The runoff from this drainage system, plus the rainwater,
19 apparently constitute the primary source of refill for the pond,
20 although there may well be underground springs.

21 IX

22 The questions for the Board to answer are: (1) is this pond a pond
23 deserving a protection under operation of RCW 90.54.020(3)(a); (2) if
24 it is, what is the "natural condition" of the pond; (3) does DOE have
25 the authority to issue an order to enforce the Water Resources Act of

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1 impacts and aesthetic impacts. More importantly for Mr. Edgington was
2 the impact on his dairy cattle. Mr. Edgington has operated a small
3 dairy farm on this site for approximately 34 years. The pond has
4 always been a source of water for his herd. The dropping of the pond
5 level and the resultant runoff of water, however, made it more
6 difficult for the cows to reach the pond.

7 As a result of these complaints, DOE investigated the situation.
8 Several meetings occurred with the landowners and numerous state and
9 county officials. The Department attempted to get the landowners to
10 agree on an average natural high water level for the pond, but
11 agreement failed to materialize.

12 VI

13 In early May of this year a DOE official placed a steel post in
14 the pond, the top of which was aligned with his determination of the
15 average high water mark in the pond as seen from Racine's property.
16 Then, on May 25, 1984, when it became apparent that negotiations would
17 be fruitless, DOE issued order No. DE 84-300. By that order DOE
18 ordered Oyster Bay Associates to

19 Construct a weir within the existing ditch located on
20 Lot 1 of the proposed subdivision identified under
21 Thurston County Large Lot case No. LL-0266. The weir
shall conform to the following specifications:

- 22 1. The bulkhead shall be of rectangular design and
23 constructed of wood, concrete, or steel. If
wood is used, the crest of the weir shall be
steel.
- 24 2. The minimum length of the crest shall be 36
25 inches.

26 FINAL FINDINGS OF FACT,
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1 water level in recent memory. That water level can be determined by
2 carefully viewing the many stumps around the perimeter of the pond and
3 locating the high water mark thereon. Observations of water marking
4 can also be made off an old raised duck blind. Aerial photos suggest
5 that during the winter and early spring the pond is higher than at
6 other seasons.¹ Then during the summer and fall, the water level
7 recedes depending on the climatic conditions.

8 IV

9 In the early spring of 1983 the northwest outlet to the pond was
10 blasted open. The ditch was deepened and widened. The pond level
11 immediately began to drop. Subsequently, on May 28, 1984, the outlet
12 was again blasted open. This was verified by Messrs. Racine and
13 Edgington who testified they heard the blast. This time the ditch was
14 deepened and widened even further. Some witnesses testified the pond
15 dropped as much as three feet and the run-out from pond's edge became
16 50 feet. Mr. Racine testified that the water level in the pond
17 dropped approximately 15" to 18" vertically, resulting in a horizontal
18 runout of approximately 20 to 25 feet at the southwest pond corner.

19 V

20 As a result, both Messrs. Racine and Edgington submitted written
21 complaints to the Department of Ecology (DOE). They objected to the
22 level of the pond dropping for several reasons, including wildlife
23

24 1. Although, this is somewhat difficult to verify because of the
25 brown algae that rests on the water which may look like ground instead
26 of water when viewed from the air.

1 pond is part of 46 acres OBA is planning to develop through a large
2 lot subdivision.

3 II

4 The pond hosts wildlife. Several species of ducks and geese use
5 the pond. Otters, beavers and muskrat frequent the pond. A large
6 blue heron rookery is located just west of the pond and the heron use
7 the pond extensively. The Washington Department of Game considers all
8 the wildlife, and especially the rookery, quite significant, as the
9 rookery currently contains approximately 75 nests and hosts
10 approximately 60 pairs of great blue herons. The heron move the
11 rookery from place to place periodically.

12 III

13 The pond has two notable outlets. One runs westerly from the
14 southwest corner of the pond, and appears to be the primary outlet
15 from the pond. The other outlet runs north-northwesterly from the
16 northwest corner of the pond. It appears that this northwest outlet
17 may have been artificially enlarged sometime in the past. It has
18 generally not been kept clear, being the victim of siltation and
19 beavers' dam building. It was blocked altogether when a logging road
20 was put in across the ditch. Exactly when this occurred is not known,
21 although appellants believe it was about 1975.

22 The ditch apparently remained in this blocked, nonmaintained
23 condition for a number of years. Beavers built dams at strategic
24 points back from this outlet. The pond level, while fluctuating
25 during the wet and dry seasons, has maintained a relatively uniform

26 FINAL FINDINGS OF FACT,
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CONCURRING OPINION

1 Board were Lawrence J. Faulk (presiding) and Gayle Rothrock.
2 Respondents elected a formal hearing pursuant to RCW 43.21B and WAC
3 371-08.

4 The proceedings were electronically recorded and officially court
5 reported by Barker & Associates of Olympia, Washington.

6 Respondent Department of Ecology was represented by Assistant
7 Attorney General, Jay J. Manning. Appellant Oyster Bay Associates was
8 represented by general partner, John S. Blyth and Ray E. Carter
9 represented himself.

10 Witnesses were sworn and testified. Exhibits were admitted and
11 examined and oral argument was heard. A site visit was made on
12 October 16, 1984. From the testimony, evidence, and contentions of
13 the parties the Board makes these

14 FINDINGS OF FACT

15 I

16 This matter involves a wetland area and pond located on property
17 adjacent to Steamboat Island Road in northern Thurston County. The
18 pond is approximately 18 acres in size, is not deep and has numerous
19 stumps, and snags, and grasses protruding from its surface.

20 Four landownerships cover different parts of the pond. Lindsay
21 Edgington, a dairy farmer, owns the northeast corner; Alfred Racine,
22 retired and a duck hunter, owns the southeast corner; Ray Carter and
23 Jack Batchelor own a north-northwest corner and periodically cut
24 firewood from this small parcel; and Oyster Bay Associates (OBA) owns
25 the majority of the pond and all of the southwest portion of it. The

26 FINAL FINDINGS OF FACT,
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CONCURRING OPINION

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
OYSTER BAY ASSOCIATES,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

RAY E CARTER,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, AND
OYSTER BAY ASSOCIATES,

Respondents.

PCHB Nos. 84-171 & 84-181

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER

These matters, the appeals of a Department of Ecology Order No. DE 84-300, issued pursuant to RCW 90.54.020(3)(a), came on for hearing on October 11 and 12, 1984, in Lacey, Washington. Seated for and as the

ORDER

The Department of Ecology Order No. DE 84-300 is vacated and the matter is remanded for further consideration consistent with this decision.

DATED this 19th day of December, 1984.

POLLUTION CONTROL HEARINGS BOARD

 12/19/84
LAWRENCE J. FAULK, Vice Chairman

See Concurring Opinion
GAYLE ROTHROCK, Chairman

Elected to Not Participate
WICK DUFFORD, Lawyer Member

VIII

The Board would suggest that DOE attempt to persuade the landowners to agree upon a level for the lake. This agreed-upon level may or may not require artificial devices to maintain that level and resolve the conflict amongst the owners. It is not the function of this Board to make these recommendations in the first instance; such is the responsibility of DOE. The Department and the five owners conceivably can, after considering the matter further, reach a satisfactory solution to this problem.

IX

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

1 it has been in recent years. Water marks on stumps attest to that, as
2 does the overly-elevated duck blind. The preponderance of the
3 evidence plus our site visit indicates that the present level
4 represents substantially the natural condition during this season
5 (fall) of the year.

6
7 V

8 Whether DOE has the authority to issue an order to enforce RCW
9 90.54 of the law as it pertains to ponds is more difficult to answer.
10 The Board believes that the case quoted by DOE (Smith v. DOE & Lucas,
11 PCHB No. 81-34) applied to streams and not ponds. Further upon
12 reading that opinion I do not reach the same conclusion as the
13 Department. Regulatory orders apply to appropriation of state waters
14 not ponds of this state. In addition, and as a practical matter, the
15 Board believes that appellants do not intend to drain the pond. For
16 these reasons the DOE order should be vacated.

17 VI

18 We express no opinion on whether DOE followed the proper procedure
19 in issuing Order No. DE 84-300.

20 VII

21 It is the interests of the five owners of the pond to arrive at a
22 level of the lake that benefits their individual interests. For that
23 reason, the order is vacated and the matter remanded to the Department
24 for further consideration.

25
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1 some persons were attempting to reduce the size of the pond, that
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6 order has been issued to enforce this RCW chapter, as it relates to
7 ponds. As a result, the Board must examine this reach for authority,
8 very carefully.

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10 Any Conclusion of Law which should be deemed a Finding of Fact is
11 hereby adopted as such.

12 From these Findings the Board comes to these

13 CONCLUSIONS OF LAW

14 I

15 The Board has jurisdiction over these persons and these matters.
16 RCW 43.21B.

17 II

18 Respondent DOE has the burden of proof in this case.

19 III

20 The Board believes the subject body of water is a pond within the
21 meaning of RCW 90.54.020(3)(a).

22 IV

23 The lake has varied 15' to 20' horizontally over the years. The
24 testimony is conflicting on the historic size of the lake. It is
25 ascertainable that the post-blast 1984 level of the pond is lower than
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1 1971 (RCW 90.54) as it pertains to ponds; and finally, (4) if it does,
2 did DOE follow the correct procedure in issuing the order?

3 X

4 Appellants each testified that it is not their intent to drain the
5 pond. They assert their only desire is to control the water level so
6 that it does not flood their property. The state asserts ponds must
7 be retained substantially in their natural condition and wetland areas
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13 had been approximately three quarters of its present size. He
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15 There is a system of drain tiles beneath his fields in this area which
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20 although there may well be underground springs.

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22 The questions for the Board to answer are: (1) is this pond
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